



## U.S. Department of Justice

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**FAX TRANSMITTAL SHEET****CONFIDENTIAL - FOR ADDRESSEE ONLY!**DATE: June 13, 2005TO: Eve Cadenas, Esq.  
Eric Singer, Esq.FAX Number: 202-434-4106 4646FROM: Bobbie Richardson, Paralegal SpecialistSUBJECT: Arthur Harvey v. USDAMESSAGE: Attached is the Consent Final Judgment and Order**NOTE: IF THIS FAX WAS RECEIVED IN ERROR, PLEASE NOTIFY THE PERSON WHO  
TRANSMITTED THIS FAX AS LISTED BELOW. THANK YOU.**Total number of pages (including this one): 5Transmitted by: Bobbie Richardson

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

ARTHUR HARVEY,  
Plaintiff,

v.

Civil No. 02-216-P-H

MIKE JOHANNNS,<sup>1</sup>  
SECRETARY OF AGRICULTURE,  
Defendant.

~~PROPOSED~~ CONSENT  
FINAL JUDGMENT AND ORDER

Whereas on January 8, 2004, this Court granted summary judgment in the Defendant's favor with respect to all nine counts of Plaintiff's Complaint; and

Whereas the Plaintiff appealed that decision with respect to all but the forth and ninth counts of his Complaint; and

Whereas on January 26, 2005, the United States Court of Appeals for the First Circuit issued its decision on Plaintiff's appeal; and

Whereas the Court of Appeals affirmed this Court's grant of summary judgment in Defendant's favor with respect to counts 2, 5, 6 and 8 of Plaintiff's Complaint; and

Whereas with respect to Count 1, the Court of Appeals remanded the matter for entry of declaratory judgment consistent with its opinion; and

Whereas the Court of Appeals reversed this Court's decision with respect to Counts 3 and 7 and remanded the matter for entry of summary judgment in the Plaintiff's favor with respect to those counts; and

A TRUE COPY  
ATTEST: William S. Brownell, Clerk

By [Signature]  
Deputy Clerk

<sup>1</sup> Mr. Johannns was sworn in as Secretary of Agriculture on January 21, 2005.

Whereas by-minute order issued March 30, 2005 in response to Plaintiff's Motion for Clarification, the Court of Appeals ordered corrections to its decision with respect to Count 3; and

Whereas the Court of Appeals did not vacate those portions of the rules that it found in excess of authority and/or contrary to law, and remanded the matter to this Court for further action; and

Whereas the Court of Appeals issued its mandate on April 6, 2005;

AND THE PARTIES, INCLUDING AM.C.U., INFORMED THE COURT AT  
NOW, IT IS HEREBY ORDERED AND ADJUDGED THAT: HEARING ON

JUDGMENT be entered in Defendant's favor with respect to counts 2, 4, 5, 6, 8, and 9 of Plaintiff's Complaint. These claims are dismissed with prejudice. ~~THAT ALSO~~  
TO THESE  
TERMS

Declaratory judgment be entered with respect to Count 1 of Plaintiff's complaint.

Judgment be entered in Plaintiff's favor with respect to counts 3 and 7 of Plaintiff's Complaint.

DECLARATORY JUDGMENT with respect to Count 1: 7 C.F.R. § 205.606 shall not be interpreted to create a blanket exemption, to the National List requirements specified in 7 U.S.C. § 6517, permitting the use of nonorganic agricultural products in or on processed organic products when their organic form is not commercially available. Consistent with the Organic Foods Production Act of 1990 (OFPA), 7 C.F.R. § 205.606 shall be interpreted to permit the use of a nonorganically produced agricultural product that has been listed in section 205.606 pursuant to National List procedures, and when a Certifying Agent has determined that the organic form of the agricultural product is not commercially available.

USDA shall, within 30 days of the date of this Judgment and Order, notice the content of the foregoing Declaratory Judgment in the Federal Register and on the

National Organic Program web site and remove all conflicting references, and shall notify all of its accredited certifying agents of the same.

The Court of Appeals' decision recognized that some producers, handlers and certifiers may have misinterpreted section 205.606 to mean that any nonorganic agricultural product which was determined by a certifying agent to be not commercially available in organic form could be used in organic products, without being individually listed pursuant to the National List procedures. That interpretation is contrary to the plain meaning of OFPA. However, because of the potential for confusion recognized by the Court of Appeals, and to enable an orderly transition to compliance with the regulation as interpreted in the foregoing Declaratory Judgment, products produced in conformance with the misinterpretation identified by the Court of Appeals and described above, and certified by an accredited certifying agent, may continue to be produced and sold for two years from the date of this Judgment and Order. No non-conforming products may enter the stream of commerce after that date.

With respect to Count 3: 7 C.F.R. §§ 205.600(b) and 605(b) are contrary to the OFPA and exceed the Secretary's rulemaking authority to the extent that they permit the addition of synthetic ingredients and processing aids in handling and processing of products which contain a minimum of 95% organic content and which are eligible to bear the USDA seal. This declaration does not apply to synthetic ingredients and processing aids authorized by 7 U.S.C. § 6519(f) or § 6510(a)(7).

So as to permit the Secretary time to obtain the benefit of input from concerned parties such as the National Organic Standards Board (NOSB), the matter is remanded to the Secretary to conduct notice and comment rulemaking and to publish in the federal register final rules implementing this Order and Judgment with regard to Count 3 not

later than 360 days from the date of this Order.

So as to prevent consumer confusion, commercial disruption and unnecessary litigation, the Secretary shall temporarily exempt nonconforming products placed in the stream of commerce as organic, while new rules are being promulgated and afterward, while producers, handlers and processors come into compliance with them. The new implementing rules shall become effective two years after the date of this order and judgment, after which no non-conforming products may enter the stream of commerce.

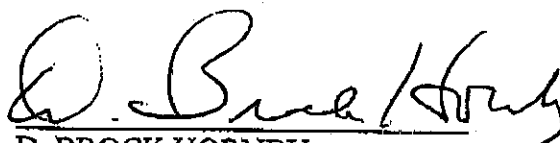
With respect to Count 7: 7 C.F.R. § 205.236(a)(2)(i), which creates an exception to general organic production requirements for conversion of whole dairy herds from traditional to organic production, is declared contrary to the OFPA and in excess of the Secretary's rulemaking authority.

The matter is remanded to the Secretary to conduct notice and comment rulemaking and to publish in the federal register final rules implementing this Order and Judgment not more than 360 days from the date of this Order.

So as to prevent consumer confusion, commercial disruption and unnecessary litigation, dairy farmers who, at the time that the new rule becomes effective, are in the process of converting their herds to organic production in conformance with the invalidated conversion rule, may complete conversion in conformance with the invalidated conversion rule. No milk produced under the invalidated rules shall enter the stream of commerce after 2 years from the date of this Judgment and Order.

Dated: 6/9/2005

SO ORDERED.

  
D. BROCK HORNBY  
UNITED STATES DISTRICT JUDGE